
CANADA / JUDGMENT

Springford & Simcoe v. Bykerk

2012 BCSC 1853

COURT

Supreme Court of British Columbia

DECIDED

10 December 2012

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2012 BCSC 1853 Springford & Simcoe v. Bykerk

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Springford & Simcoe v. Bykerk,

2012 BCSC 1853

Date: 20121210

Docket: 46196

Registry: Kamloops

IN THE MATTER OF THE LEGAL PROFESSION ACT

S.B.C. 1998, Chap. 9, s. 70

Between:

Springford & Simcoe

Lawyer

And

William & Bernadine Bykerk

Clients

Before: Master R.W. McDiarmid

Corrected Judgment: The text of the judgment was corrected at
paragraphs 46 and 48 on December 19, 2012

Reasons for Judgment

Counsel for the Lawyer:

K.T. Simcoe

William & Bernadine Bykerk appeared on their own behalf:

Place and Date of Hearing:

Kamloops, B.C.

October 26, 2011 and

August 9 and September 26, 2012

Place and Date of Judgment:

Kamloops, B.C.

December 10, 2012

- [1] Bernadine Bykerk and William Bykerk (the "clients") retained Kevin Simcoe (the "lawyer"), then a lawyer who had been called to the bar of British Columbia for ten years, to act for them in litigation against Bernie's Ltd. and Bernard Kapalka ("Kapalka"). Kapalka and Bernie's Ltd., a company controlled by him, had commenced litigation in the Vernon registry of this court on October 28, 2008. The writ of summons with statement of claim attached accused the clients of wrongfully occupying property owned by the plaintiffs, wrongfully taking possession of the premises owned by the plaintiffs, theft of cattle owned by the plaintiffs, theft of equipment owned by the plaintiffs, breach of fiduciary relationships, conspiracy, and other claims. The plaintiffs were claiming injunctive relief, return of equipment, eviction of the clients from the plaintiffs' property, an accounting, and punitive and exemplary damages.
- [2] On October 31, 2008, the plaintiffs obtained an ex parte order allowing the plaintiffs the right to take possession of what is referred to in the order as "the property of the plaintiff." That order had a "police assist" clause. There was a further ex parte order made on November 5, 2008.
- [3] After being given notice of the proceedings on November 13, 2008, the clients retained the lawyer and his law firm.
- [4] The clients and the lawyer signed a written retainer agreement dated November 13, 2008.
- [5] In giving the background to the litigation, the lawyer introduced as part of exhibit 1 much of the affidavit material the plaintiffs utilized to obtain these ex parte orders. The court documentation shows an extraordinarily aggressive approach taken by the plaintiffs.

- [6] After the lawyer was retained, the plaintiffs brought on an application delivered by fax on December 23, 2008 at 15:45 hrs. to strike out the defence and have matters determined by way of summary trial. That application sought an order directing the RCMP to investigate the conduct of the defendants and to charge them. That application was supported by an affidavit sworn by the legal assistant for plaintiffs' counsel quoting an anonymous source which she did not identify.
- [7] The lawyer characterizes the time from being retained until finally getting to court with sufficient materials to enable him to properly represent the clients as "time intensive." He testified that the conduct of the plaintiffs was "continuous and relentless." He points out that nowhere in the materials provided to the court for the various ex parte orders did the plaintiff, Kapalka, comment on the highly relevant fact that he was the father of Bernadine Bykerk, one of the clients.
- [8] Once matters were fully presented to Mr. Justice Williams, which occurred on February 9, 2009, his Lordship vacated the ex parte orders.
- [9] In preparing for the February 9, 2009 hearing, the lawyer initially prepared a one-paragraph pro forma statement of defence to avoid a default judgment being taken against the defendants. The conduct of the plaintiffs and their counsel made it clear that strict compliance with time limits was essential.
- [10] The lawyer then prepared a detailed notice of motion which was filed December 31, 2008, a detailed and comprehensive 30-paragraph amended statement of defence which was filed January 7, 2009, affidavits for each of the clients, and written submissions encompassing 52 paragraphs which comprehensively reviewed the law applicable to setting aside ex parte orders, the salient facts from the clients' perspective, and submissions for costs against the solicitor on the basis that the lawyer's conduct was reprehensible or amounted to an abuse of the process of the court.
- [11] There were three orders made on February 9, 2009, two of them dealing with directions to smooth the ongoing litigation.
- [12] A third order set aside the ex parte order and gave directions for counsel to provide written submissions in relation to costs, as well as some other terms to minimize contact between the parties.
- [13] On February 20, 2009, the lawyer provided a 13-page written submission to the court, along with an affidavit from a legal assistant employed by the lawyer's law firm. This affidavit sets out the following:
2. On January 19, 2009, we issued a bill for services rendered to the Defendants in the amount of \$15,992.19. Attached as Exhibit "A" to this my Affidavit is a true copy of that invoice. In this invoice, fees totalled \$13,640.00, taxes totalled \$1,694.34 and disbursements totalled \$657.85.
 3. The total amount of legal fees, taxes and disbursements on this file to date is \$35,000.23.

4. The total number of hours that can be attributed to the actions of the Plaintiffs and their counsel, that I understand were discussed at the hearing of February 9, 2009, is 85 hours. This does not include the time that would have been incurred on the file in any event. For example, this does not include the fees related to preparing and filing the Appearance, the Statement of Defence or the Counterclaim.

...

6. Disbursements totalling at least \$1,724.06, including taxes, can be attributed to the actions of the Plaintiffs and their counsel. In fact, this number may be even higher as it is difficult to separate the number of photocopies that were necessary. Attached as Exhibit "C" to this my Affidavit is a true copy of a pre-bill printout from PCLaw. I have numbered those entries with an asterisk that can be attributed to the actions of the Plaintiffs and their counsel.

[14] On July 29, 2009, Mr. Justice Williams gave reasons for judgment relating to costs.

[15] It is worth reproducing a portion of Mr. Justice Williams' decision in *Bernie's Ltd. v. Bykerk*, 2009 BCSC 1028 at paras. 9 and 13, where he writes:

[9] At the time this order was being obtained and subsequently, counsel for the plaintiffs was ardently pressing the defendants to provide pleadings. It would appear that a tight and demanding time frame was imposed over the Christmas vacation.

...

[13] In concluding that the order of December 12, 2008 could not stand, I found that:

- a. a considerable part of the evidence tendered in support of the application was improper and inadmissible; namely it was hearsay evidence attributed to an unnamed source;
- b. in the course of the oral hearing, counsel for the plaintiffs fell markedly short of fulfilling his duty of candour to the court. Specifically, and most importantly, when pressed to provide the details of the relationship and background of the parties, he failed to apprise the court that there was a familial connection and that the defendants had resided on one of the properties in issue for many years. The situation was presented as one of critical urgency. I am satisfied that matters were portrayed in a light that was, in respect of relevant and material issues, neither candid nor complete. In fact, I believe that the very basis for an ex parte without notice application was absent.

[16] Justice Williams found that the conduct of the plaintiffs was improper and deserving of reproof or rebuke such that they should be required to substantially indemnify the defendants for costs.

[17] At that point, costs were presented at \$25,524.06. Justice Williams awarded 80 percent of actual fees incurred in an amount of \$17,000.00, \$2,040.00 in taxes on that amount, and \$1,724.06 as necessary disbursements and related taxes, for a total of \$20,764.06 payable by the plaintiffs to the defendants no later than 60 days from the issuance of the ruling.

- [18] In coming to his determination to award 80 percent of actual fees incurred, Mr. Justice Williams wrote at para. 29 as follows:
- [29] I do not find unreasonable the contention of the defendants that a significant share of the fees claimed are attributable to dealing with the December 12, 2008 order and to setting it aside. At the same time, it must be recognized that some of what was done was necessary to defend against the action and would have been necessary in any event. ...
- [19] Based on an extract from the examination for discovery transcript provided as part of exhibit 1, it is apparent that counsel for the plaintiffs continued to act in a manner which falls short of the standards expected of counsel in this province.
- [20] This is relevant insofar as it impacts on the time spent by the lawyer, recognizing that this was one of those cases where, unfortunately for the clients, additional time was needed to be expended in order to properly do the job for which the lawyer had been retained.
- [21] The retainer agreement at tab 4 of exhibit 1 sets out that the lawyer's time was to be charged at \$250.00 per hour, and the time of legal assistants would be charged at the rate of \$125.00 per hour. It sets out an authorization to incur disbursements, although it does not specify any particular amounts for those disbursements. It sets out an agreement to pay interest and overdue accounts at the rate of 1.5 percent per month or 18 percent per annum, calculated monthly (effective annual rate of 19.56 percent). It confirms that the clients provided a retainer of \$1,500.00. It sets out the basis for fees which is as follows:

Our fees will be based upon the following considerations, among others:

- (i) time and labour spent by us on your behalf;
- (ii) complexity of the matter, difficulty and novelty of the questions involved, skills, specialized knowledge and responsibility of the lawyer;
- (iii) amount of money and value of property involved;
- (iv) number and importance of documents prepared to review;
- (v) circumstances under which services are rendered;
- (vi) importance of this matter to you;
- (vii) ... charges of other lawyers of equal standing; and
- (viii) the end results achieved.

Our accounts will generally not be less than the time costs we record, based on the standard hourly rates in effect from time to time. The writer's hourly rate is \$250.00 per hour. The time of our legal assistants are charged at the rate of \$125.00 per hour, resulting in savings to you in respect of work that would otherwise have been charged at the lawyer's hourly rate.

- [22] The clients continued to retain the lawyer up until the summer of 2011. During that time, the following accounts were rendered by the lawyer to the clients:
- a) an account dated January 19, 2009 for \$15,992.19. At that time, \$14,000.00 was applied to the account from the retainer resulting in \$1,992.19 owing; the clients had provided a total retainer of \$15,000.00, so that \$1,000.00 remained in a retainer trust;
 - b) accounts dated December 3, 2009 in the amount of \$12,000.00 and December 18, 2009 in the amount of \$8,764.06; these accounts were paid from the monies ordered to be paid by the plaintiffs to the defendants by Mr. Justice Williams. The manner in which the law firm dealt with these accounts has caused some confusion and resulted in extensive cross-examination of the lawyer by Mr. Bykerk;
 - c) an account dated July 30, 2010 in the amount of \$4,551.33 which was paid from money in trust; and
 - d) an account dated August 15, 2011 entitled Statement of Account for Services Rendered for the Period January 20, 2009 to August 15, 2011 (time from November 3, 2008 to January 19, 2009 is billed under invoice number 3745). This is the account which is the subject matter of this review and is in the amount of \$26,771.47. \$11,137.49 of the account was paid from monies in trust, resulting in a balance of \$15,633.98 claimed by the lawyer.
- [23] Tab 52 of exhibit 1 provides a useful summary. That summary shows that the clients provided retainers totalling \$35,000.00. They provided a retainer of \$2,500.00 on November 13, 2008, an additional \$2,500.00 on December 4, 2008, and a third retainer in the amount of \$10,000.00 on January 10, 2009. Of that \$15,000.00, \$14,000.00 was applied to the January 19, 2009 invoice, and \$1,000.00 was retained in retainer trust.
- [24] In December of 2009, \$20,764.00 in satisfaction of the judgment for special costs was received. The law firm then rendered two interim accounts totalling \$20,764.00, one dated December 3, 2009 for a total of \$12,000.00 and one dated December 18, 2009 for a total of \$8,764.06.
- [25] The lawyer's accountants "backed out" applicable GST and PST, rendering accounts for fees of \$10,714.29, plus GST at 5 percent in the amount of \$535.71 and PST at 7 percent in the amount of \$750.00, so that the December 3, 2009 account totalled \$12,000.00. On the December 18, 2009 account, the fee was billed at \$7,825.06, GST at \$391.25, PST at \$547.75 for a total of \$8,764.06. These two accounts were then paid from the monies received from the plaintiffs.
- [26] On July 30, 2010, the lawyer issued a disbursement account only for taxable disbursements in the amount of \$3,328.38, HST on those disbursements in the amount of \$399.40, non-taxable disbursements totalling \$823.55, for a total account of \$4,551.33 on the account. This was being paid from funds in trust, which was noted.

- [27] In July of 2010, the clients paid a further retainer of \$10,000.00. In June of 2011, the clients paid a further retainer of \$10,000.00.
- [28] Accordingly, by August of 2011, the clients had paid \$35,000.00 toward legal fees and disbursements. In addition, \$20,764.06 was received from the plaintiffs.
- [29] The relationship between the parties broke down in the summer of 2011, when the lawyer required a further \$20,000.00 to \$30,000.00 retainer for future work, including preparation for and attendance at an upcoming eight-day trial.
- [30] On August 15, 2011, the lawyer issued a statement of account for services rendered for the period January 20, 2009 to August 15, 2011, noting on the account that the time from November 3, 2008 to January 19, 2009 had previously been billed by the account referred to in para. 22 a) above.
- [31] The August 15, 2011 account was confusing. The lawyer was extensively cross-examined on aspects of that account. There was cross-examination on time spent and on the necessity for certain charges.
- [32] The account contained two entries, one on December 3, 2009 entitled "Billed on Invoice #4353", which deducted \$10,714.29 from a running total balance shown on that account, and an entry on December 18, 2009 entitled "Billed on Invoice #4365", which deducted \$7,825.06 from the running total. Those two invoices are the accounts referred to in paras. 24-26 above.
- [33] It is easy to see why the clients were somewhat confused by this accounting procedure.
- [34] I have carefully reviewed the time entries and the accounting entries. I am satisfied that the judgment amount paid by the plaintiffs to the law firm in December of 2009 has been properly accounted for. I am satisfied that the clients have received full credit for the payments received from the plaintiffs.
- [35] The lawyer provided two summary documents, entered as tabs 52 and 53 of exhibit 1. In addition, the lawyer provided a printout of the client ledger from January 20, 2009 through to when the lawyer's services were terminated by the clients in August of 2011.
- [36] I have reviewed the history of this matter. Although the clients' appointment to review the lawyer's bill only sought a review of the August 15, 2011 statement of account, I have also considered the statement of account rendered January 19, 2009, and a disbursement account dated July 30, 2010.

- [37] The two statements of account and the time records provided in relation to the second statement of account demonstrate that significant lawyer's time was expended for the clients. Some of the practices of the lawyer in reviewing materials and personally being involved with their filing, strike me as being excessively cautious. On the other hand, this was without question a difficult file in the sense that the opponents (both the plaintiffs and their lawyer) were difficult to deal with.
- [38] The clients put exhibit 2 into evidence. Exhibit 2 includes a copy of the appointment, a draft certificate, page 2 of a letter from the lawyer to the clients dated August 8, 2011 and the August 15, 2011 account.
- [39] The account appears to have been faxed to the clients on August 23, 2011 at 16:33 hrs., so the bill is considered delivered on August 24, 2011.
- [40] Page 2 of the August 8, 2011 letter is obviously a "without prejudice" effort by the lawyer to resolve the issue of his fees. Once I became aware of this, I did not continue to read it and have disregarded it.
- [41] In considering *Yule v. Saskatoon (City)*, [1955] S.J. No. 65 factors codified in s. 71 of the Legal Profession Act, S.B.C. 1996, c. 9 [LPA], I make the following findings:
- a) The issues involved here were quite complex. Furthermore, the conduct of the plaintiffs and their lawyer made dealing with the clients' issues difficult. While successfully obtaining an order for special costs payable forthwith is not novel, it is not something which happens with great regularity in normal civil litigation;
 - b) The lawyer practices in the area of civil litigation. He was a ten-year call. The manner in which the materials were prepared by him and presented to the court demonstrates that he had the requisite skill and specialized knowledge to act for these clients. Furthermore, he did so in a timely way on a file where timeliness was obviously important;
 - c) There was no evidence with respect to the lawyer's character and standing in the profession, other than the fact of his ten-year call;
 - d) The amount involved here included significant amounts of equipment and also the clients' residence. No specific evidence was led about the amount involved; this factor overlaps with my finding with respect to (g) below;
 - e) There was a lot of time spent on this file. Having heard the evidence and listened to the extensive cross-examination of the lawyer by the client, William Bykerk, I find that there was some time that was not reasonably spent, but in the scheme of things it is minimal. There was some duplication of time when the lawyer was consulting with other lawyers in the law firm;

- f) There was an agreement that set the fee rate of \$250.00 per hour. That rate strikes me as being somewhat on the high side for a lawyer of the lawyer's experience at the time he was retained;
 - g) This was obviously an extremely important matter to the clients;
 - h) From my review of matters, the lawyer obtained a very good result for the clients in 2009. In the face of aggressive litigation from the plaintiffs, he was able to secure the clients' position and obtain and collect a substantial costs award. He also conducted discoveries in the face of aggressive tactics by the plaintiffs' counsel. He had moved matters along to set the matter down for an eight-day trial, although his retainer terminated prior to that occurring. On balance, he achieved significant success.
- [42] I find that the fees, charges and disbursements for the services set out on the statement of account dated January 19, 2009 were reasonably necessary and proper to conduct the proceeding to that date, and were authorized by or subsequently approved by the clients. I was concerned with a disbursement charged for \$360.00 for a legal assistant. That was explained as an overtime fee which was charged.
- [43] Although not part of the account which was attached to the appointment, I am troubled by the disbursement billed on the July 30, 2010 account for \$1,745.00 for a legal assistant. The lawyer testified that this was for work which would have been done at a cheaper rate. I am mindful that the retainer agreement includes a provision to charge legal assistants' time at the rate of \$125.00 per hour. I have taken this into account in determining the result here.
- [44] I find that of the total fees billed on the account in the amount of \$23,810.65, fees of \$20,000.00 on that account are reasonably necessary and proper to conduct the proceeding or business to which they relate. I find as well that these fees in the amount of \$20,000.00 were reasonably intended by the lawyer to advance the interests of the clients at the time the services were provided.
- [45] I find the disbursements of \$92.45, plus \$11.09 HST, for a total of \$103.54 to be reasonably necessary and proper.

Summary

- [46] I allow fees of \$20,000.00 and taxes on fees of \$2,400.00. I allow taxable disbursements as claimed, together with HST totalling \$103.54 for a total of fees, disbursements and taxes allowed of \$22,503.54. \$11,137.49 has been paid from monies in trust. I find that there is balance due and owing of \$11,366.05.
- [47] Under s. 73(2)(b) of the LPA, I may summarily determine the amount of costs of the review and add it to or subtract it from the amount shown on the certificate. Much of the time expended on this review, which has spread over three days of hearing time, resulted from the lawyer's accounting practices which were confusing to the clients. On the other hand, some of the cross-examination by the clients was, in my view, unnecessary. The bill was

presented at \$26,771.47 and allowed at \$22,503.54, so that \$4,267.93 was subtracted from it; that is approximately 16 percent of the bill, just under one-sixth. In the circumstances, each party should bear their own costs, but the lawyer is entitled to the disbursements for issuance and service of the appointment.

[48] I must add to an amount certified an amount of interest calculated on the amount I have allowed from the date the lawyer delivered the bill at the rate agreed to by the parties. I have found \$11,366.05 was owing.

[49] The lawyer should prepare a certificate for me, setting out the disbursements and an interest calculation if interest is claimed. If claimed, interest would commence August 25, 2011; the certificate will be dated the date of these reasons.

"Master R.W. McDiarmid"

MASTER McDIARMID

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